Neutral Citation: [2019] EWHC 391 (Ch)

Claim No: HC-2017-001496

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2019

Before:

MR WILLIAM TROWER QC
(sitting as a Deputy Judge of the High Court)

Between:

JOLYON TOBY DENNIS MAUGHAM QC

Claimant

- and -

UBER LONDON LIMITED

Defendant

Vikram Sachdeva QC and **Jack Anderson** (instructed by **Edwin Coe LLP**) for the **Claimant**
Sam Grodzinski QC (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing date: 6 February 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

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MR WILLIAM TROWER QC

Mr William Trower QC:

1. This is an application by Mr Jolyon Maugham QC for a protective costs order ("PCO") in proceedings which he has commenced against Uber London Limited ("Uber"). In particular, he seeks an order that, in the event of the claim failing in part or whole, the amount of any order for costs to be paid by him shall be limited to £20,000.

2. The relief sought in the claim form is a declaration that Uber is required to provide Mr Maugham with a VAT invoice in relation to the supply of transport services in the form of a private hire vehicle on 15 March 2017. The requirement is said to arise under regulations 13 and 14 of the Value Added Tax Regulations 1995 ("the 1995 Regulations"). Mr Maugham also seeks an order that Uber provide him with a VAT invoice in relation to that supply.

3. The relevant private hire vehicle was booked by Mr Maugham through the Uber App, and the journey was a short taxi ride from his Chambers to a client. The value of the services said to have been supplied to Mr Maugham (£6.34) and the amount of VAT that would be payable (£1.06) is accepted by him to be trivial. Mr Maugham does not contend that this case is about his ability to recover that amount as input tax, but rather raises issues of principle.

4. In Mr Maugham's submission, the issue of principle which arises is one of great public importance, both (a) because of the substantial amount of VAT that would be payable to HMRC if it were to be established that Uber is liable to account for VAT when users of its App hire a taxi, and (b) to maintain public trust and confidence in the fair administration of VAT.

5. A Defence has not yet been served, but Uber denies that it provides transport services. Its case is that it acts as an intermediary between the user and the third-party driver who provides the transport. It follows, so Uber contends, that the only person from whom Mr Maugham could be entitled to receive a VAT invoice is the driver, and whether one will be provided will depend on whether the driver is registered for VAT. In this case (and doubtless in most other cases) the relevant driver was not registered for VAT.

6. Mr Maugham is a Queen's Counsel with a specialist practice as a tax litigator. He spends a substantial part of his time writing and campaigning on the intersection between law and politics with a particular focus on tax, workers' rights, intergenerational fairness and Brexit. He is also the founder and director of the Good Law Project Limited ("GLP"), a not-for-profit organisation which supports court process in those fields in order to achieve progressive law change. GLP has an income of around £25,000 per annum comprised of voluntary subscriptions from members of the public.

7. Since the commencement of these proceedings, GLP has obtained three PCOs, all in public law litigation in a Brexit context. One was granted in a claim against the Electoral Commission seeking a judicial review of its failure to investigate matters relating to referendum donations, another in Scottish proceedings to establish whether the Article 50 notice was capable of being withdrawn and a third in judicial review proceedings against the Department for Exiting the European Union, seeking to compel the production of certain studies into the effect of Brexit on different regions and sectors of the economy.

8. Mr Maugham explains in his evidence that GLP recognises the need for a democratic mandate for law change, and so actively seeks to engage with the public around the cases that it litigates. He says that a particular expression of the need for a democratic mandate is its litigation funding methods, which generally involve crowdfunding. In the present case, the crowdfunding has raised £107,650 from some 3,400 separate donations, of which well in excess of 50% are anticipated by Mr Maugham to have originated from the black cab trade. GLP has also received a further donation of £20,000 from an unnamed organisation connected with that trade.

9. Mr Maugham stresses that he has no personal connection with members of the black cab trade and is not motivated in any way by a desire to advance their interests. He accepts, however, that this litigation could deliver them benefits if he succeeds in compelling Uber to charge VAT. He also accepts that the motives of the black cab trade funders will not be the same as his but makes clear that they have always been aware that he is not litigating to benefit their trade and that they will have no influence on his conduct of the litigation.

10. Mr Maugham has explained that he is motivated in bringing these proceedings by his long and demonstrable interest in questions of public trust. In particular he believes that there is a public perception that financially meaningful tax avoidance, particularly by US tech companies, is tolerated in the United Kingdom, which damages the propensity of others to pay their taxes. He also considers that many of these companies pay significantly more tax in other jurisdictions, and that a public perception that this is the case, highlighted by the media, adds to public distrust of the establishment.

11. Furthermore, Mr Maugham considers that, if this public perception is well-founded, HMRC are failing to apply the law while, if it is ill-founded, HMRC need to engage more meaningfully with that public concern. He contends that these kinds of consideration demonstrate and illustrate the types of public interest with which these proceedings are primarily concerned.

12. In his evidence, Mr Maugham also says that, given the nature and extent of Uber's operations, an informed estimate of its liability to output tax if he were

to succeed could be arrears of £1 billion with an annual liability of approximately £200 million going forward. He says that there is an obvious public interest in securing that, if they are due, these enormous sums of money are collected by HMRC.

13. The way that the public interest was described in the skeleton argument prepared on Mr Maugham's behalf by Mr Vikram Sachdeva QC and Mr Jack Anderson was on a similar theme, but the emphasis was slightly different:

> *"There is an extremely clear public interest at stake in the resolution of this case. HMRC is not taking any action, in circumstances where there is real reason ... to believe that the relevant relationships (and therefore the relevant supplies) have been mischaracterised, and where there is an incomplete explanation from HMRC of its position, and no right to disclosure of the full train of correspondence."*

14. This description of the public interest focuses on what is said to be (a) a mischaracterisation of the relevant relationships between Uber, the taxi driver and the user of the service and (b) a failure by HMRC to take action in order to challenge that mischaracterisation. In his oral submissions, Mr Sachdeva amplified this point submitting that there is a general public interest in ensuring clarity in the relationship between a supplier and the user of its services.

15. Mr Maugham has adduced evidence that Uber's costs of these proceedings could reach £1 million at first instance, an estimate with which I did not understand Uber to take issue. So far as his own representation is concerned, Mr Maugham says that he will try to pay Government rates to his counsel, but there is a general understanding that (depending on costs orders) they may not get paid at all. Mr Maugham says that, although he is relatively wealthy by most standards, he will certainly not be able to continue as a litigant without the benefit of some sort of meaningful cost protection. He has also put in evidence to the effect that, if the court is unwilling to make a PCO in his favour because of the extent of his own personal resources, he has found a young VAT registered businessman with no material assets, who is prepared to make an equivalent claim to the one made in these proceedings.

16. As a matter of contract, the relationship between Uber and the user is governed by the terms and conditions for use of the Uber App (the "T&Cs"). The T&Cs provide for Uber to be acting as disclosed agent for the driver (described as the Transportation Provider). They further stipulate that Uber does not itself provide transportation services, is not a Transportation Provider, only acts as intermediary between the user and the Transportation Provider and is not a party to the contract between them. This language is said by Mr Maugham to amount to a mischaracterisation (anyway for VAT purposes) of the true nature of the relationships. Mr Sachdeva submits in reliance on the decision of the ECJ in *Revenue and Customs Commissioners v Newey (t/a Ocean Finance)* [2013] STC

2432 that what matters for VAT purposes is the economic and commercial realities and not necessarily the terms of the contract itself.

17. The two authorities relied on by Mr Maugham as reflecting those realities and the mischaracterisation by Uber of the true nature of these relationships, thereby leading to a conclusion that the true service provider for VAT purposes is Uber not the driver, are:

17.1 *Uber BV v Aslam* [2018] EWCA Civ 2748 in which the Court of Appeal concluded (see para 95 of the judgment of Etherton MR and Bean LJ) that an Employment Tribunal was entitled to find that:

> "*it is not real to regard Uber as working "for" the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits*"

17.2 Case c-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL* [2018] QB 854 in which the ECJ concluded (see para 48 of the judgment) that in the context of:

> "*an intermediation service ... the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and accordingly must be classified as "a service in the field of transport" within the meaning of article 58(1) FEU*".

18. Both of these cases were decided in a factual and legal context different to the present proceedings. I am not in a position to determine the strength of the argument that they demonstrate that the relationships in issue are mischaracterised by the T&Cs. Mr Maugham did not contend that it is clear or obvious that they do, although he did contend that he has a strong case to that effect.

19. On the other hand, it was not said by Uber on this application that Mr Maugham's prospects of success were fanciful, although it did reserve the right to apply to strike out these proceedings on such grounds in the event that they are continued. I was also told that Uber has obtained permission to appeal to the Supreme Court in *Uber v Aslam*. Uber also reserved its position on whether it is arguable that the 1995 Regulations give a person in the position of Mr Maugham a cause of action for the provision of a VAT invoice or whether they are only intended to be enforceable by HMRC, another point with which I am not invited to grapple on this application.

20. In light of the purpose for which Mr Maugham brings these proceedings, it might be thought that the points he seeks to advance ought to be made by way of judicial review, and in his evidence, he explains that he has given thought to taking this course. That is not surprising, as he has described HMRC's conduct in failing to raise protective assessments on Uber as "inexplicable", "outrageous" and "a genuine scandal". Accordingly, it is a major part of his complaint, not just that HMRC are not collecting tax that is due, but also that in failing to do so HMRC are behaving in a wholly unreasonable manner.

21. However, having referred to the decision of Simon J in *R (UK Uncut Legal Action Ltd) v Commissioners of HMRC* [2012] EWHC 2017 (Admin) ("*Uncut Legal*"), on which he relies as recognising a plain public interest in allowing a pressure group to challenge the lawfulness of HMRC's actions vis-a-vis Goldman Sachs, Mr Maugham explained his attitude to judicial review in the present case in the following passage:

> "*To take that step would be point a finger at only a small part of the picture I have outlined above. The political ramifications of a finding by a court – which, as I have said, I believe to be likely – that Uber is making taxable supplies and the Government has failed to collect the consequential VAT would be substantial. My hope is that, as the litigation progresses, pressure will build on the Government to engage with the undoubted public concern around tax avoidance generally and Uber's specifically. I believe that this is a far more effective means to bring the issues I have outlined above into the public domain than a judicial investigation into whether HMRC's conduct falls below a (necessarily, given the entirely appropriate split of competencies between the judiciary and the executive) low standard.*"

22. The court's jurisdiction to make a PCO derives from section 51 of the Senior Courts Act 1981 ("section 51"), which as Mr Sachdeva submitted gives a very wide discretion. That discretion is, however "*... by no means untrammelled. It must be exercised in accordance with the rules of court and established principles*" per Hoffmann LJ in *McDonald v. Horn* [1995] ICR 685, 694B/C. Hoffmann LJ's reference to established principles was to those established by the appellate courts, whose role in establishing them was said by Lord Goff in *Aiden Shipping Co Ltd v. Interbulk* Ltd [1986] AC 965, 975 to be a policy justification for the width of the jurisdiction conferred by section 51.

23. The general rule contained in the rules of court (CPR 44.2(2)(a)) is that the unsuccessful party will be ordered to pay the costs of the successful party. The existence of the statutory predecessor to this rule (Ord 62, r.3(3)) was described by Hoffmann LJ in *McDonald v. Horn* (at p.694D-F) as "*a basic rule of civil procedure*" and "*a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation*". It is readily comprehensible why this is still the case as CPR 44.2 requires the court to have regard to "*all the circumstances*" when deciding what order if any it should make about costs,

and those circumstances include matters which will be difficult and often impossible to prejudge as at the time at which a pre-emptive costs order is sought to be made.

24. Nonetheless, there are a number of circumstances in which legislation and appellate authority have laid down principles in which costs orders having prospective effect can, and should, be made. Indeed, in *McDonald v. Horn* itself the Court of Appeal upheld the making of a pre-emptive costs order in favour of members of a pension fund which ensured that, win or lose, their costs would be paid out of the fund. This reflected the incremental development of principles derived from *Wallersteiner v. Moir (No 2)* [1975] QB 373, a minority shareholders' derivative action.

25. Other circumstances in which an order having prospective effect can be made are:

24.1 A costs capping order under CPR 3.19. This rule applies to proceedings other than judicial review proceedings. Mr Maugham does not seek such relief on this application because he says that it would only apply to limit his exposure in relation to future costs and would have required the court to be satisfied that there is a substantial risk that costs will be disproportionately incurred (CPR 3.19(5)(b)).

24.2 A costs capping order regulated by sections 88 and 89 of the Criminal Justice and Courts Act 2015 ("2015 Act") and CPR 46.16 to 46.19. For these purposes a costs capping order is defined by section 88(2) of the 2015 Act as "*an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings*". As the present proceedings are not judicial review proceedings, this jurisdiction and the limitations for which it provides do not apply.

24.3 A costs capping order in an Aarhus Convention claim within the meaning of CPR 45.41(2)(a), relief which is itself excluded from the 2015 Act regime (The Criminal Justice and Courts Act 2015 (Disapplication of Sections 88 and 89 Regulations) 2017 (SI 2017 No 100)). These are claims for judicial review in certain environmental matters in respect of which there is a free-standing statutory code which limits the recoverability of costs (see Section VII of CPR Part 45).

26. In the present case, the PCO sought by Mr Maugham is based on the principles laid down by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 ("*Corner House*"). Mr Sam Grodzinski QC for Uber submits that the *Corner House* principles do not apply to Part 7 private law proceedings such as these that have not been brought

against a public authority. He also submits that the circumstances of the case do not justify the making of a PCO in any event.

27. The first detailed consideration of a PCO was the decision of Dyson J in *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347 ("*CPAG*"), a case in which two separate applications were determined. The first application was made in proceedings in which CPAG sought an order quashing the decision of the Lord Chancellor refusing to extend the availability of legal aid in cases before social security tribunals or commissioners. The second application was made in proceedings in which Amnesty International sought an order quashing a decision of the DPP not to prosecute two individuals for possession of electro-shock batons without a licence. Both sets of proceedings sought to overturn decisions by public bodies on public law grounds.

28. It was not disputed in *CPAG* that, if the applications had been made in private law actions, the court would have been bound to dismiss them; this was because of the considerations explained by Hoffmann LJ in the passages from *McDonald v Horn* referred to above. Dyson J said (at p.349G/H) that the main question of principle which arose was whether different considerations applied in the case of what he called "*public interest challenges*". He then explained (at p.353G/H) what he meant by this phrase:

> "*I should start by explaining what I understand to be meant by a public interest challenge. The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.*"

29. The emphasis on public law challenges raising public law issues of general importance reflected the fact that the costs question with which Dyson J was dealing only arose in claims challenging the acts or omissions of public bodies and claims designed to ensure that public bodies do not exceed or abuse their powers (see the context in which he was invited to grant PCO relief described at *CPAG* pp.353G-354B). It was in that context that he drew a distinction between public law cases in which the applicant was protecting some interest of his own and those in which he was not: in the former case a PCO would be inappropriate; in the latter case it might not.

30. The guidelines laid down by Dyson J were not concerned at all with private law proceedings, whether or not they raised issues that might be regarded as of general public importance. Even in the case of public law proceedings, he made clear that it was only in the most exceptional circumstances that a PCO should be made (*CPAG* p.357F). This approach was later approved by the Court of

Appeal in *Corner House* (at para 72) and was recognised by Waller LJ in *R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436 ("*Compton*") at para 24 as "*a prediction as to the effect of applying the [Corner House] principles*".

31. The focus on public law issues of general importance arising in the context of a public interest challenge was also at the core of the decision in *Corner House* itself. It was an application for judicial review of the Secretary of State's decision to amend the procedures of the Export Credit Guarantee Department and its standard forms relating to bribery, corruption and money laundering. The claim alleged a failure to consult and raised questions of fairness in public decision making. It was a public law challenge to the decision-making processes of a public body.

32. In *Corner House* (at para 28) the Court of Appeal made plain that the case was "*concerned not with the incidence of costs in private law civil or family litigation or with statutory (or other) appeals, but with the incidence of costs in a judicial review application at first instance*". A concentration on how the PCO jurisdiction related to public law litigation (as distinct from private law civil and family litigation) and issues "*involving a public authority as to a question of public law*" is also apparent from paras 69 to 73 of the judgment, where the Court of Appeal confirmed that it accepted all but one of Dyson J's guidelines, having first recited that they related to public interest challenges. It is against this background that it restated the governing principles as follows (at para 74):

> *"We would therefore restate the governing principles in these terms:*
> *(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:(i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*
> *(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.*
> *(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."*

33. Apart from public interest challenges, the only other relevant context in which I have been told that the *Corner House* PCO jurisdiction has been followed is in tax appeals in the Upper Tribunal, where it applies without the codified limitations imposed in relation to claims for judicial review by sections 88 and 89 of the 2015 Act (see the two decisions of Judge Greg Sinfield in *Drummond v Revenue and Customs Commissioners* [2016] UKUT 221 (TCC) and *Drummond v the Commissioners for HMRC* [2016] UKUT 369 (TCC)). An

appeal against a tax assessment requires the Upper Tribunal to adjudicate on the relationship between the individual and a public body, and the law which ensures that a public body does not exceed or abuse its powers. It is doing so in the context of proceedings to which the relevant public body (HMRC) is a party, and the appeal process itself is a statutory replacement for the judicial review proceedings that might otherwise be available (*R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716 at para 57).

34. Against that background, Mr Grodzinski relied not just on the context in which PCOs have been made, but also on the fact that there is no authority in which a PCO has been made in private law proceedings properly so called. He submitted that for the reasons given above, tax appeals were not private law proceedings.

35. He also placed reliance on *Eweida v British Airways Plc* [2009] EWCA Civ 1025 ("*Eweida*"), in which the distinction between private litigation and public law litigation and the effect which this has on the court's ability to make a PCO, was one of the principal points in issue. The claim was one by an employee for unlawful discrimination in respect of her religious belief. The question related to BA's uniform policy and her desire to wear a cross that was visible. The employee's discrimination claim failed in the Employment Tribunal and the EAT. The issue of a PCO first arose on her further appeal to the Court of Appeal, being the first time at which she was at risk of an adverse costs order being made against her.

36. The Court of Appeal accepted (at para 14) that the issue raised by the proceedings was of general importance having been described by the EAT as "*raising a fundamental issue concerning the scope of indirect discrimination*". Notwithstanding the general importance of the issue raised, it was held that a PCO could not be made. Lloyd LJ (with whose judgment Moses LJ and Maurice Kay LJ agreed) summarised his conclusion as follows:

> "*In my judgment, the court cannot make a PCO in this case. This is not public law litigation, but a private claim by a single employee against her employer. A PCO cannot be made in private litigation.*"

37. Mr Sachdeva submitted that the only *ratio* of *Eweida* was that a PCO could not be made in an employment case which did not amount to public law litigation, and he pointed out that Lloyd LJ went on to describe it as "*a private claim for the benefit of the employee*", thereby focusing on the private interest element as the exclusionary factor as opposed to any dichotomy between private law and public law. I do not agree with this analysis.

38. In my view it was an essential part of the Court of Appeal's reasoning that, notwithstanding the general importance of the issue, the fact that the claim was a private claim brought in private litigation was fatal to the application. This is apparent from the way in which Lloyd LJ expressed himself in para 38 of his

judgment. It is also apparent from the summary of *Corner House* which Lloyd LJ gave in para 15 of his judgment. The employment context, and the consequential extent of the private interest, was but one illustration of that underlying principle.

39. I was referred to two further decisions of the Court of Appeal in which *Eweida* was considered. In my view, neither of them undermines the general point of principle which it established, and in some respects, they support it.

40. The first case was *Unison v Kelly* [2012] IRLR 951, in which the Court of Appeal considered *Eweida* when concluding that it was appropriate for the respondents to an appeal from a cost-free jurisdiction to have costs protection as a condition of the appellants being granted permission to appeal. Notwithstanding the analogy that such a case had with the PCO jurisdiction, both Elias LJ (at para 14) and Richards LJ (at para 21) accepted that *Eweida* had established that a PCO could not be made in private litigation.

41. Mr Sachdeva relied on the doubts expressed by Richards LJ (at para 21): "*It may be that notwithstanding Eweida the wide discretion of the court in matters relating to costs would admit of the possibility of a freestanding order analogous to a PCO even in private litigation*". But the application in the present case is for a PCO, not something else, and nothing that Richards LJ said founds an argument that the principle established in *Eweida* is not good law. Indeed, if anything it is more consistent with a conclusion that, where what is sought is a *Corner House* PCO, the fact that the proceedings are private litigation continues to be a bar.

42. The second case was *Austin v Miller Argent (South Wales) Ltd* [2015] 1 WLR 62 ("*Austin*"), in which the Court of Appeal was concerned with an application for a PCO in a private nuisance action in which the claimant alleged that she was affected by dust and noise which unreasonably interfered with the enjoyment of her own home. The claim was said to be within the scope of the Aarhus Convention, but because it was not a claim for judicial review it was not a claim to which the statutory code in Section VII of CPR Part 45 applied.

43. The Court of Appeal concluded that the claim was capable of falling within the Convention, even though it was not an "Aarhus Convention claim" within the meaning of CPR 45.41(2)(a). It followed that if, on its facts, the claim was one that conferred significant public environmental benefits which were more than incidental to private property interests, the obligation that the remedy should not be prohibitively expensive would be engaged. The further consequence was that the court was required to consider whether or not to grant costs protection in the special context of an environmental claim within the scope of the Aarhus Convention.

44. It is established that any difference between environmental and non-environmental claims should not affect the application of the *Corner House* principles: see Waller LJ in *Compton* (at para 20) and Clarke MR in *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 ("*Buglife*") (at para 17). However, this was said about the application of the paragraph 74 principles, not about the more fundamental point decided in *Eweida*, namely that PCOs are not available in private litigation. In my view the operation of the Aarhus Convention means that there is more scope for concluding that the restriction confirmed by *Eweida* may not apply with the same force to a private law environmental claim.

45. More importantly, I agree with Mr Grodzinski's submission that there is nothing in the judgment in *Austin* which doubted the statement of principle in *Eweida* that a PCO cannot be made in private litigation. *Eweida* was discussed by Elias LJ in *Austin*, albeit on the extent to which the existence of a private interest might bar a PCO (*Corner House* principle (1)(iii)), which is a slightly different point. However, if he had considered that he was departing from what Lloyd LJ said about private litigation, he would have said so in terms. In any event, a PCO was not made in *Austin*, and it is of some relevance that one of the factors which seems to have militated against such an order being made was the fact that the defendant was a private body using its own private resources (para 47 of the judgment). This is a point to which I shall return.

46. I was referred to two other private law cases in which the issue of a PCO had arisen. They both pre-dated *Eweida* and were considered in Lloyd LJ's judgment but neither involves a PCO properly so-called:

42.1 *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam) was a case in which, (per Lloyd LJ in *Eweida* at para 25), the President had treated the proceedings as "*essentially "quasi-public" ... essentially directed to the elucidation of public law ... which might appropriately be brought in the Administrative Court but for the statutory provision contained in section 55 of the 1986 Act.*" Lloyd LJ also pointed out that the order in fact made was a cost capping order not a PCO.

42.2 *Morgan and Baker v Hinton Organics (Wessex) Limited* [2009] 2 P&CR 4 ("*Morgan*") was another case said to be governed by the Aarhus Convention in which no order was in fact made. Lloyd LJ said as follows (*Eweida* at para 29):

> *"So far as I am aware there is no other example of private litigation in which the Corner House principles have been considered for possible application, let alone applied. Morgan v Hinton was private law litigation (a claim for an injunction based on nuisance) but the issue did not concern a PCO, and no such order had been applied for (except upon the hearing of the appeal which was far too late, even if it had otherwise been well-founded).*

47. In these circumstances, I consider that I should exercise my discretion under section 51 in accordance with the conclusion reached in *Eweida* to the effect that a PCO cannot be made in private litigation. Even if it is open to me to make a PCO in such a case, the nature of the proceedings would be a material factor against making such an order.

48. This does, however, leave the question of whether the present case amounts to private litigation in the sense intended by the Court of Appeal. Mr Sachdeva submitted that Lloyd LJ did not define what he meant by the phrase and that there is no reason why the dichotomy between "private law cases" and "public law litigation" should be defined by reference to the procedure by which a claim is brought rather than the substance of the issue to be determined.

49. I agree that the procedure chosen by the claimant is unlikely to be determinative in itself on the question of whether the claim is private litigation for PCO purposes. In the present case, however, the only cause of action that Mr Maugham asserts is a private law entitlement to the provision of a VAT invoice, a claim that he says he can pursue against a private person, namely Uber. No public body is joined to these proceedings and any relief to which Mr Maugham may be entitled does not depend on any abuse of power by a public body, nor does it require a finding that a public body has failed to perform its duties.

50. In his skeleton argument Mr Sachdeva identified the public law issue as being whether Uber must register for VAT, but I did not understand that to be pursued, because Uber is in fact so registered. While I have already described what was said to be the public interest, it was not clear to me what the issues of public law that require to be determined in these proceedings in fact are.

51. In my view, the mere fact that success by Mr Maugham in his proceedings against Uber might mean that HMRC would have been entitled to assess Uber to VAT on the provision of transport services, does not mean that the claim now advanced by Mr Maugham is either public law litigation or one which raises public law issues. On the assumption that Mr Maugham has an actionable right to sue for a VAT invoice, the claim is one between two private persons for a determination of the question of whether their relationship is such that a VAT invoice is required to be provided pursuant to the 1995 Regulations. Uber is a defendant in its capacity as a potential taxpayer; it carries out no public functions.

52. I should add that it is not contended by Mr Maugham that the mere fact that he is motivated by altruism and a desire to right what he sees as a wrong done to the public purse, rather than by any private benefit, can affect the proper classification of the proceedings. I think that he was right to adopt that approach, not least because his purpose and motive in utilising any cause of action that

might be available to him is of no legal relevance to the question of whether he is entitled to the order that he seeks.

53. If I am wrong to conclude that the decision in *Eweida* means that I should not exercise my discretion to make a PCO in this case, it is necessary to consider the application of the *Corner House* principles listed in para 74 of the judgment, and they must be applied in a flexible way: *Buglife* (at para 25). As Waller LJ explained in *Compton* (at para 21), applied in *Buglife* (at para 17), the first two principles - whether the issues raised in these proceedings are of general public importance and whether the public interest requires that the issues raised in the proceedings should be resolved - are often difficult to separate. I shall consider them together.

54. Uber says that the issues raised by Mr Maugham are not of general public importance. Mr Grodzinski pointed to the types of proceeding which the Court of Appeal in *Corner House* had in mind (see para 52) "*where it is in the public interest for the courts to review the legality of novel acts by the executive in the context in which it is unreasonable to expect that anyone would be willing to bear the financial risks inherent in a challenge*" and submitted that these proceedings do not fall within this category. That is plainly right in the sense that no act of the executive is subject to challenge in the proceedings themselves.

55. Mr Maugham disagrees that this means that they are not of general public importance and refers to the considerable public interest in the case. He says that the chair of the House of Commons' Public Accounts Committee has described it as extraordinary that HMRC have not formally investigated Uber's approach (she did so at the time that Mr Maugham was describing HMRC's conduct in failing to raise protective assessments on Uber as inexplicable, outrageous and a genuine scandal). He accepts that not every case relating to the application of the tax code is one of general public importance, but says that the present case is, because of the issue of principle, the amounts at stake and public concern as to the administration of the system.

56. I do not doubt that it is a matter of general public importance that HMRC's procedures for enforcing the payment of taxes should be lawful. That much was said by Simon J in *Uncut Legal* ([2012] EWHC 2017 (Admin) at para 12). But just because there is public interest in issues illustrated by and surrounding this case does not mean that the issues actually raised in these proceedings are themselves of general public importance, anyway in the sense intended by the Court of Appeal in *Corner House*. The point in issue is whether Uber was required to provide a VAT invoice, and if so whether Mr Maugham has a cause of action to require it to do so. As Mr Grodzinski submitted, the claim involves the application of established principles of law to the facts. This is the

consequence of Mr Maugham choosing to bring private litigation against Uber, not a public law claim against HMRC.

57. I am also doubtful that these proceedings can be said to raise issues of general public importance merely because they might establish a basis on which HMRC could then proceed to raise an assessment for a substantial amount of unpaid tax. Success by Mr Maugham might provide an important building block for an argument that HMRC have got it wrong in the past and have done so in a context in which large sums of money are at stake, but again that does not mean that the issues which actually have to be decided in these proceedings are of general public importance. In my view, the claim itself, even if not its consequences, is very far removed from the types of proceeding which the Court of Appeal in *Corner House* had in mind when confirming the jurisdiction.

58. Mr Maugham also says that the public interest in exposing HMRC's failure to take the steps that they should to recover VAT from Uber is in issue in these proceedings and that nobody else is taking any steps against Uber to prevent an ongoing loss to the public revenue. In effect, he contends that these are proceedings in which the process of preventing that loss can begin. Uber disagrees and says that the second *Corner House* principle means that the court must consider whether the public interest requires that the issues of general public importance be resolved *in these proceedings*, i.e. the proceedings in which the application for a PCO is being made. I agree that this is the right approach.

59. In my view, it is necessary to focus on the issues of general public importance and ask whether these are the proceedings in which the public interest requires those issues to be resolved. This seems to me to be a particularly weighty consideration in circumstances in which proceedings said to be motivated by a desire to make a public body do its job properly, which is the only public law issue to which the proceedings are said to relate, are not proceedings to which that public body is a party. Not only are HMRC not a party, but there is no relevant allegation in these proceedings (nor could there be) which challenges the propriety or lawfulness of their acts, omissions or decisions.

60. At the outset of the proceedings, it was said by Uber that Mr Maugham's entitlement to claim input tax could be tested by an alternative route, which was to reclaim the input tax from HMRC pursuant to regulation 29 of the 1995 Regulations. This regulation gives HMRC an ability to direct that other evidence of a charge to VAT is sufficient, and it was said that Mr Maugham could then appeal any refusal to the First-tier Tribunal (Tax Chamber) ("FTT") or by way of judicial review.

61. Initially, Mr Maugham said that this was unsatisfactory as a way forward because the issue that would arise in such circumstances would be collateral to

the issue raised in these proceedings, which in any event may not arise depending on the attitude taken by HMRC. However, shortly after this application was issued, he asked HMRC to exercise their discretion to accept evidence other than a VAT receipt for the purposes of regulation 29(2) and in November 2017 he received a letter from HMRC containing a decision that they would not make a direction permitting him to do so.

62. This gave Mr Maugham a decision to appeal to the FTT and he agreed a stay of these proceedings (and the original hearing of this application) pending determination of that question. Mr Maugham then made an application to join Uber to the appeal, but before the FTT was able to deal with the application the Court of Appeal delivered judgment in *Zipvit Ltd v HMRC* [2018] EWCA Civ 1515 holding that regulation 29 did not apply where the supplier of the service had not accounted for VAT and was not going to do so. It concluded that regulation 29 is limited to cases where (e.g.) the supplier has accounted for VAT, but the invoice had been lost or did not contain the prescribed particulars. The effect of *Zipvit* was that Mr Maugham's appeal was bound to fail even if he could have shown that the supply was taxable and has now been dismissed by consent.

63. Despite the closure of this route to a possible judicial determination of Uber's obligation to provide a VAT invoice, it continues to be Uber's case that the present proceedings are not required to ensure that the public interest is protected. It contends that, if there is any public interest in challenging Uber's tax arrangements, which it does not accept that there is, the public interest is sufficiently protected by HMRC, who have a statutory duty under section 5 of the Commissioners for Revenue and Customs Act 2005 to collect and manage VAT, and so there is no need for Mr Maugham to bring these proceedings.

64. Uber points out that if it fails to make a return when required to do so, HMRC can raise an assessment under s.73(1) of the Value Added Tax Act 1994 ("VATA") and Uber can then appeal that assessment under section 83 of VATA if it disputes it. It says that Mr Maugham has no power to take that course, but that is the right place for an examination of Uber's trading arrangements. It is HMRC, not Mr Maugham, to whom Parliament has entrusted the duty to collect VAT, and it is to HMRC that Parliament has entrusted the necessary powers to carry out that duty.

65. Uber therefore says that the proper procedural route by which any dispute as to its liability to tax should be resolved is through the assessment and tribunal appeal process. Mr Grodzinski cited *Autologic Holdings Plc v IRC* [2006] 1 AC 118 (at para 12) in support of that submission, and submitted that the public interest requires that route to be pursued He also relied on *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617 ("*Fleet Street Casuals*"), where there was a difference of view between the members of

the House of Lords as to whether or not one taxpayer had a sufficient interest to complain about assessments made on another taxpayer, but concluded that any such claim should be limited to exceptional cases not least because "*the total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system*" (per Lord Wilberforce in *Fleet Street Casuals* at p.633D)

66. I agree with Mr Sachdeva that pure questions of standing are not approached in quite the same way today as they were at the time that *Fleet Street Casuals* was decided (see e.g. in a tax context Simon J in *Uncut Legal* at para 9). In this area, it seems that the courts recognise a difference between a public pressure group whose purpose is to vindicate the rule of law and to stop unlawful action and a busybody whose gratuitous actions complaining about public administration are to the general detriment of the high standards of public administration that they seek to uphold. I should add that nothing I say in this judgment should be taken to indicate that I have concluded that Mr Maugham is such a busybody.

67. However, I do not agree that this means that the public interest test for PCO purposes is easy to satisfy, given the strong countervailing public interest that matters of tax assessment and enforcement are normally a matter for HMRC not other taxpayers. In my view, Mr Maugham would need to establish that the public interest requires resolution of this particular aspect of Uber's tax affairs to be taken over by him. This will depend upon an examination of the breach of duty or illegality alleged but is likely to prove a difficult test for him to satisfy.

68. In that context, there is evidence from Uber that HMRC are well aware of its trading arrangements, and that for several years there has been regular dialogue with HMRC regarding the Uber group's activities which have included discussion about VAT. Apparently, it has not been suggested to Uber that it does not comply with the relevant legislation.

69. Uber also says that it can be seen from a transcript of the evidence given to the Public Accounts Committee by HMRC's chief executive and permanent secretary on 6 November 2017 that HMRC are monitoring the legal ramifications of the employment tribunal decision which ultimately led to the Court of Appeal decision in *Uber v Aslam*. As I have already explained this is one of the foundations that underpins Mr Maugham's arguments as to the true nature of the relationships between Uber, the user and the Transport Provider. HMRC have explained that their examination of the issues which arise continues, but their public position in November 2017 (when this application was first listed for hearing) was summarised in the following manner, which demonstrates that this is not an issue which is being ignored by the executive:

> "*We will monitor the two ongoing legal cases; depending on how they land, we will take further counsel's opinion and we will test it again. You talked about one taxpayer, but there is a vast array of these*

> *intermediary organisations. I am being transparent with you: we have tried six times in the last three years to prove that they are the principals and we have lost.*"

70. Mr Maugham has challenged HMRC's conduct in failing to raise VAT assessments on Uber as "inexplicable", "outrageous" and "a genuine scandal", and he criticises their general approach to assessment and enforcement in this area. He may be right that HMRC are in fact failing in their duty, but even if they could be pursuing Uber, the evidence does not establish that the public interest requires that that issue be investigated in these proceedings. A properly formulated public law challenge by way of judicial review is the right way of reviewing HMRC's conduct in not exercising its powers under section 73(1) of VATA and would engage the possibility of a costs capping order under the 2015 Act.

71. Mr Maugham says that this is an insufficient alternative because it would have to focus on the reasonableness of HMRC's decision on *Wednesbury* grounds and that there would be difficulties in getting to the bottom of whether HMRC had acted properly or unlawfully because of the statutory confidentiality that attaches to a taxpayer's affairs. In the passage from his evidence set out earlier in this judgment he also explained that his motivation is to bring pressure on the Government, and that he regards private proceedings against Uber as a more effective way of doing so than a challenge to HMRC's conduct by way of judicial review.

72. What this illustrates is that Mr Maugham's real complaint is that a public law remedy will be difficult to pursue, and that he fears that it may not achieve his ultimate goal. However, that is not a reason to make a PCO in his favour in private proceedings which are designed to achieve a similar result, but which are based on a different juridical foundation and do not require the real point of general importance to be determined.

73. The third *Corner House* principle is that the applicant has no private interest in the outcome of the case. In judicial review proceedings such as *Corner House* itself, the relevance of this consideration has now been put on a statutory basis by section 89(1)(b) of the 2015 Act but is expressed in more flexible terms: "*the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review*".

74. This more flexible test reflects a line of pre-2015 Act cases, reviewed by the Court of Appeal in *Austin*, in which different judges took different views on the extent to which a private interest was an absolute bar to obtaining a PCO. The view that was ultimately reached (shortly before the enactment of section 89 of the 2015 Act codified the point for most proceedings to which it might otherwise apply) is reflected in the following passage from *Austin:*

> "*Accordingly, we would accept that the mere fact that the claimant has a personal interest in the litigation does not of itself bar her from obtaining a PCO.*"

75. In both *Drummond* decisions it was also held that, in applying the *Corner House* principles to an Upper Tribunal appeal, private interest is a factor to be considered, but is not a bar to the making of a PCO. In that sense as well, the tax appeal jurisdiction has adopted a similar approach to PCOs as applied in the context of other public law litigation prior to the enactment of the 2015 Act.

76. In the present case, it seems to me that Mr Maugham is able to satisfy the test, however rigidly it might be applied. No attempt was made to challenge his evidence that he has no personal commercial interest other than an amount which on any view is trivial. The most that could be said is that he has a strong interest in litigating the types of issue that I have described at the beginning of this judgment, but it does not seem to me that this amounts to a personal interest of the type with which *Corner House* principle (1)(iii) was concerned.

77. Of more significance, however, is the fact that substantially more than 50% of the funding has already been provided by people connected with the black cab trade and it is clear that the black cab trade funders do have a private interest, which would be likely to be a disqualifying personal or private interest if they were to be claimants in these proceedings in place of Mr Maugham. This is not one of the factors to which the court is required to have regard by a strict application of the *Corner House* principles, but "*the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted*" is a factor to which the court is required to have regard when considering whether to make a judicial review costs capping order within the meaning of section 88 of the 2015 Act (see section 89(1)(c)).

78. I agree with Mr Grodzinski that the benefit to the black cab trade funders is more than incidental, because it would require some of their competitors to charge materially increased fares if they are to cover payment of VAT. I also agree with Mr Grodzinski that it would be curious if, on an application for judicial review, the interests of the black cab trade funders were to be a relevant consideration under the statute, while on an application for a *Corner House* PCO they are not. The fact that substantially in excess of 50% of the existing funding derives from the black cab trade is one of the relevant circumstances of the case which the Court of Appeal in *Buglife* (at para 20) said that the court should take into account when determining whether an order should be made and if so in what form. It counts against the making of a PCO in this case.

79. The fourth *Corner House* principle is whether, having regard to the financial resources of the applicant and the respondent, and to the amount of costs that are likely to be involved, it is fair and just to make the order. I agree with Mr

Grodzinski's submission that this principle has to be assessed in light of the reasoning which underpins its formulation, namely "*where it is unreasonable to expect that anyone would be willing to bear the financial risks inherent in a challenge*" (per the Court of Appeal in *Corner House* at para 52).

80. Uber contends that it is not unreasonable for a litigant who raises funds through crowdfunding to have to raise enough to cover both his own costs and those of the other party in the event that the claim is not successful. This is particularly the case where the crowdfunding is raised with a majority contribution from those who have a commercial interest in the outcome of the proceedings, and where the named claimant has significant assets which he is not prepared, albeit for understandable reasons, to expose to the risk of an adverse costs order.

81. On this part of the case Mr Sachdeva referred to *R (Hawking & Ors) v Secretary of State for Health and Social Care* [2018] EWHC 989 (Admin), where the existence of limited resources from crowdfunding was not a reason to decline a PCO. That was a case to which the regime of the 2015 Act applied, but I agree that it demonstrates that a successful crowdfunding campaign will not always mean that a costs capping order is inappropriate. It is self-evident that each case depends on its own facts, but it is worthy of note that the protection given in that case was £80,000 to each of the five claimants and Cheema Grubb J did so in light of the fact that (at para 25):

> "*where the public is funding both sides of the review in the sense that crowdfunding feeds the claim and taxpayers' money funds the defence, it is entirely appropriate for a judicial review costs capping order to be made at appropriate level which will not artificially limit either side's efforts and expenditure, but which will enable this claim to be heard.*"

82. This passage illustrates one of the other relevant factors in the present case. Unlike a public interest challenge as defined by Dyson J in *CPAG*, the defendant (Uber) is a private entity using its own private resources. The evidence is that those resources are very substantial, so taken alone the factor has limited impact, but the fact that the defence is not being funded by the taxpayer, but by a private commercial organisation seeking to defend its own private commercial interests weighs in the balance against making a PCO. At its most simple it takes this case further away from the types of case with which *Corner House* was concerned and closer to the "*ordinary litigation*" identified by Hoffmann LJ in *McDonald v Horn.*

83. Mr Maugham says that he considers that it is very unlikely that he will be able to raise any more from crowdfunding, not least because, for reasons related to his ill-fated attempt to pursue an alternative remedy, he has made substantially no progress in the litigation since the money was raised two years ago. He also says that it is not reasonable to expect him to risk exposing his own resources to the risk of an adverse costs order, especially when set against the very considerable resources available to Uber.

84. In my view, the fact that the crowdfunding for these proceedings has been raised with a majority contribution from those who have a commercial interest in the outcome of the proceedings is a relevant consideration. I accept that *Corner House* makes no reference to the resources of funders, but like the point on benefit to funders, the financial resources of "*any person who provides, or may provide, financial support to the parties*" is a factor to which the court is required to have regard when considering whether to make a judicial review costs capping order within the meaning of section 88 (see section 89(1)(a) of the 2015 Act). It would be curious if, on an application for judicial review, the resources of the black cab trade funders were to be a relevant consideration under the statute, while on an application for a *Corner House* PCO they are not. In my view (per *Buglife* at para 20) it is one of the relevant circumstances for me to consider.

85. I have no evidence on the resources of individual black cab trade funders although I can take into account the fact that a single contribution of £20,000 has been made. I can also infer from the number of contributors and the total amount raised that much of the crowdfunding is likely to have come from individual black cab drivers of limited means. I also accept that Mr Maugham's doubts that they will make any further contributions are both realistic and genuinely held, and that his hesitation about asking them for more for the reasons that I have already explained is readily understandable.

86. When considering what is just and fair in this context (as required by the formulation of *Corner House* principle (1)(iv)), I take into account the limited and disparate nature of the resources of Mr Maugham and the funders. I also accept the evidence that Uber has very substantial resources of its own with which to fight the litigation.

87. Ultimately, however, the existence of a significant body of people with a commercial interest in the outcome of these proceedings, who have already provided some funding, when combined with the means of Mr Maugham himself, means that the fourth *Corner House* principle is not sufficiently satisfied to outweigh the factors pointing the other way. I cannot predict whether I would have reached the same conclusion if the other principles had not weighed in the balance in the way that they do. It is unlikely, however, that it would have made any difference to my conclusion if the claimant were to have been the asset-less young businessman referred to earlier in this judgment.

88. The fifth *Corner House* principle is that, if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. I accept Mr Maugham's evidence that he will certainly not continue with these proceedings without the benefit of some form of meaningful costs protection, and I accept that it is reasonable for him to reach that conclusion

balancing his own personal circumstances against the extent of his potential exposure to an adverse costs order. To that extent this factor points in favour of a PCO.

89. However, Mr Maugham has indicated an intention to apply for a costs management order under CPR 3.12(1)(e) if a PCO is refused. I have not been asked to consider what order the court might make if he were to do so, but the fact that he may wish to take that course makes it difficult to conclude that he will probably discontinue the proceedings (and will be acting reasonably in so doing) if I refuse the relief that he now seeks.

90. The final *Corner House* principle is that, if those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO. To an extent, this principle is satisfied, because the evidence is that those representing Mr Maugham are doing so on much reduced rates and on the understanding that they may not get paid at all. It is not, however, a case in which the representation is being conducted in all respects pro bono, because the proposal is that at least £100,000 of the crowdfunding that has already been raised will be used to pay Mr Maugham's own lawyers.

91. In these circumstances, I do not consider that this is a case in which the justice of the case makes it appropriate for the court to make a PCO. While I accept the width of the discretion under section 51, I do not consider that these are the types of proceeding to which the regime established by *CPAG* and *Corner House* was intended to apply. In any event, even if I were to be wrong about that, taking into account all of the *Corner House* principles, and such of the other discretionary factors as I have described in this judgment, I do not consider that it would be fair and just to make such an order in this case.